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NO. 460

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER *et al.*

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

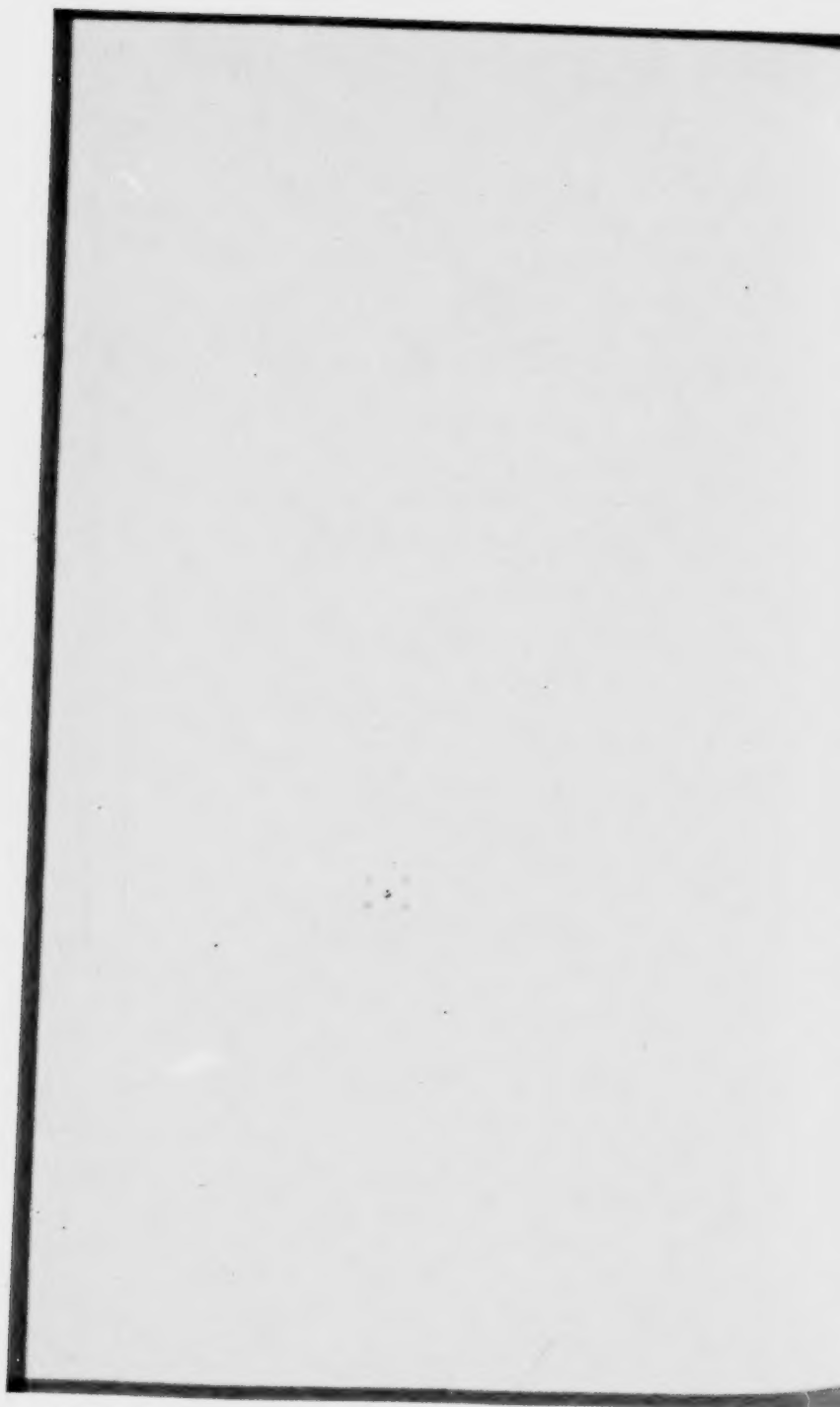
IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

SEYMOUR STEDMAN,

ATTORNEY FOR PLAINTIFFS IN ERROR.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

VICTOR L. BERGER et al.	}
<i>Plaintiffs in Error,</i>	
<i>v.s.</i>	
THE UNITED STATES OF AMERICA,	
<i>Defendant in Error.</i>	

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This cause is brought to this court upon a certificate from the Seventh Circuit Court of Appeals, to determine questions of law whereof the judges, before whom this cause is pending upon writ of error, are in doubt.

On February 2, 1918, there was returned into the District Court of the United States for the Northern District of Illinois, Eastern Division, an indictment against the plaintiffs in error, charging them with the violation of certain sections of the Act of Congress of June 15, 1917, known as the Espionage Act.

On October 25, 1918, the Honorable Evan A. Evans, a circuit judge in and for the Seventh Judicial Circuit and then sitting in said District Court, heard and passed upon certain demurrers and pleas in the said court, and thereupon, on November 12, 1918,

there was filed in the said District Court by said plaintiffs in error an affidavit of prejudice of the Honorable Kenesaw M. Landis, one of the two judges of the said District Court, which affidavit is in the words and figures following, to-wit:

"To the Honorable Judges of the United States District Court of the Northern District of Illinois, Eastern Division:

Your petitioners, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, jointly and respectively, respectfully represent that they are defendants in the above entitled cause wherein they are charged with the crime of conspiracy; that his Honor, Judge Kenesaw Mountain Landis, Judge of the United States District Court for said District is presiding over the trial of criminal cases in said court; that the above entitled cause was heretofore presided over by Judge Evan Evans a Judge of the United States Circuit before whom a demurrer in the above entitled cause was presented and argued and before whom a plea of former acquittal was filed by the defendant, Adolph Germer; that said demurrer and plea were ruled upon adverse to these defendants on or about October 26, 1918.

Your petitioners further represent that they presumed that the trial of said cause would probably be presided over by said Judge who heard said motion but that they have been informed within the last week that said cause was on the calendar of and to be presided over by said Judge Kenesaw Mountain Landis unless otherwise provided by the court in accordance with Section 21 of the Judicial Code of the United States.

Your petitioners further represent that they jointly and severally verily believe that his Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, to-wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause, and impleaded with J. Louis Engdahl and Irwin St. John Tucker, defendants in this case. That the grounds for the

petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: 'If anybody has said anything worse about the Germans than I have I would like to know it so I can use it.' And referring to a German who was charged with stating that 'Germany had money and plenty of men and wait and see what she is going to do to the United States,' Judge Landis said in substance: 'One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace times, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower.'

These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, de-

fendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, national Secretary of the Socialist party; William F. Kruse, editor of the Young Socialists Magazine, a socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

Your petitioners further aver that the defendants Tucker and Engdahl were born in the United States and were not born in enemy countries, and are not immediate descendants of persons born in enemy countries, but verily believe because they are impleaded with Berger, Kruse and Germer that they as well as Berger, Germer and Kruse can not receive a fair and impartial trial, and that the prejudice of said Judge Landis against said Berger, Germer and Kruse would prejudice the defense of said defendants Tucker and Engdahl impleaded in this case.

Wherefore your petitioners pray that proper proceedings be had in accordance with either Section 20 or Section 23 of said Judicial Code of the United States so that the senior Circuit Judge of the seventh circuit in which said Northern District of Illinois, Eastern Division, is located shall assign a district judge to said circuit other than the said Kenesaw Mountain Landis to preside at the trial of the above entitled cause.

VICTOR L. BERGER
ADOLPH GERMER
J. LOUIS ENGDAHL,
IRWIN ST. JOHN TUCKER
WILLIAM F. KRUSE.

STATE OF ILLINOIS, }
COUNTY OF COOK } ss.

Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, being first severally and jointly sworn on oath say that they are respectively the persons whose names are subscribed to the foregoing petition for designation of a different judge for the trial of the above entitled cause because of the prejudice of the presiding judge; that they are each respectively familiar with the contents of said petition, and that the matters and things therein contained are true in substance and in fact, except such matters and things as are set forth on information and belief and as to such matters and things said affiants believe them to be true.

VICTOR L. BERGER
ADOLPH GERMER
J. LOUIS ENGDAHL
IRWIN ST. JOHN TUCKER
WILLIAM F. KRUSE.

Subscribed and sworn to before me this 8th day of November, A. D. 1918.

IDA T. MAHNKE,
Notary Public.

I Seymour Stedman, attorney for Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, defendants in the above entitled cause, do hereby certify that I have prepared the foregoing petition for change of venue and said petition and application for change of venue is made in good faith.

SEYMOUR STEDMAN,
Attorney for Defendants."

It appears from the record of proceedings in said District Court that after the filing of said affidavit of prejudice and on to-wit November 16, 1918, the following proceedings thereon were thereupon had in the said court before Honorable Kenesaw M. Landis as judge thereof, viz:

"The Court: (To defendants Berger, Germer,

Engdahl, Tucker and Kruse). You have filed a petition here—at all events a petition has been filed here purporting to bear the signature of you five men, subscribed before a notary public on the 8th day of November, 1918: Do you know what I am talking about?

To which question all of the defendants replied 'Yes.'

The Court: Who informed you, Mr. Berger, that this court, meaning this particular occupant of the bench, used this language:

'One must have a very judicial mind indeed not to be prejudiced against the German-Americans in this country; their hearts are reeking with disloyalty; this defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all of the Germans in this country; the same kind of an excuse of the defendant offering to protect the German people is the same kind of an excuse offered by pacifists in this country who are against the United States and have the interest of the enemy at heart by defending that thing that they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country to get away from the Kaiser and the war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same kind that practically all of the German-Americans are in this country. You call yourselves "German-Americans"; your hearts are reeking with disloyalty.'

Where did you get that?

Mr. Stedman (representing plaintiffs in error): I want to object to the examination of petitioners as witnesses on the trial of any issue raised on this petition.

The Court: Is this objection raised at the request of the defendant?

Mr. Stedman: I am representing these persons.

The Court: Your objection is overruled.

Mr. Stedman: Exception.

Mr. Berger: Judge, I am to be guided by my attorney.

The Court: I do not want you to go into anything

that may be involved in the case—all I am asking is this: I assume that you are a man who is interested in the truth. Am I right in that assumption?

Mr. Berger: Yes, sir.

The Court: Now, you heard my inquiry: Who told you that I said this? You heard my question.

Mr. Berger: Yes.

The Court: And you heard Mr. Stedman object to that question. Does he object to that question in your behalf, at your request?

Mr. Berger: He is my attorney and I have no right to interfere with his way of conducting this case.

The Court: Is that the answer of each of the defendants?

(To which each of the defendants replied, 'Yes.')

The court further inquired of the defendants if they understood that all his question asked for was the source of their authority for the assertion that he had used the language quoted in the petition, and the defendants stated that they so understood it, and that they availed themselves of the objection made by counsel.

The court then inquired of Mr. Cochem, Attorney representing Defendant Berger, whether he had made any effort to ascertain the accuracy of the statement alleged to have been made by the Court. Cochem replied that he had not.

The Court: Is there anything you want to say in support of this motion?

Mr. Stedman: Nothing at all.

The Court: The motion is denied.

The Court: I am asking you if the member of the bar, Mr. Johnson, now standing by your side, and who, you informed me the other day was your authority for these facts, does he swear that I made use of that language?

Mr. Stedman: His affidavit is not there, but he does make that statement.

The Court: Does he swear in this proceeding?

Mr. Stedman: No.

The Court: Now further, let me inquire, that language which this affidavit attributes to me in the manner disclosed by the affidavit, as I understood

you to say the other day, is claimed by Mr. Johnson, the gentleman I have referred to, to have been used by me in connection with the disposition of the case of the United States against Weissensel?

Mr. Johnson: That is correct.

The Court: After the verdict, and upon the occasions of the imposition of the sentence?

Mr. Stedman: Yes.

The Court: Mr. Johnson, do you now desire to be sworn to give me your evidence as to this statement for the court to use on passing on the motion for change of venue?

Mr. Johnson: No, sir.

The Court: You are a member of this bar?

Mr. Johnson: I am.

The Court: The motion for the order asked is denied.

Mr. Clyne: Does Mr. Johnson appear as one of the counsel?

Mr. Johnson: Yes, I am one of the counsel.

Mr. Clyne: If your Honor please, we have a stenographic report, if your Honor cares to put it into the record, of what was said on that particular occasion, and we have the reporter here who reported and transcribed it.

The Court: You may file it; not that it is of any interest—

Mr. Johnson: Your Honor, I want to make a statement—

The Court: Anything you desire to say about the facts will have to be made under oath.

Mr. Johnson: I want to make my objection—

The Court: Just a moment. This court, in dealing with a situation of this kind will have to, as it must be obvious, will have to adopt such rules and procedure as will tend to discourage the use of the the change of venue processes authorized by the statutes of the United States as a mere vehicle for the conveyance of slander and libel. Now, anything you want to say about this you will have to present here under oath, in view of your attitude, sir.

Mr. Stedman: I want an objection and exception to the introduction in this case, I understand,—I have not seen it, but there was some purported report offered in evidence by the District Attorney and

I want—I understand it was filed and I want to object to it.

The Court: Object to it being filed?

Mr. Stedman: I object to it being introduced in evidence. Now, do you understand that was introduced in evidence by simply filing it?

The Court: The only interest I could have in that,—my understanding is, that that is probably not admissible; probably incompetent,—in other words, as I understand the general rule, it is at least seriously questionable whether a fact that is averred,—the thing averred as a fact is controverted—

The Court: I will let it go in on this theory: having read that petition, I think that the judge against whom that averment is made, if the averment is not in fact true, if the report upon which the averment was made is in fact untrue, it goes to his own court; the truth should be shown of record in connection with the falsity. Maybe I am powerless in that, I do not know, but this affiant swears that he has been told that I said that the hearts of all German-Americans were reeking with disloyalty. I will let it be filed.

Mr. Stedman: And we take an exception to that.

Be it further remembered that thereafter said motion for a change of venue coming on to be heard on said petition, and the court having heard the arguments of counsel and being fully advised in the premises, the court then and there overruled and denied said petition.

To which ruling of the court the said defendants by their respective counsel, then and there in open court, duly excepted.

Subsequently there was filed herein said stenographic report, same being in words and figures as follows, to-wit:

CITY OF CHICAGO, }
STATE OF ILLINOIS. } ss.

HUGH P. LUTZ, being first duly sworn on oath, deposes and says, that he has been a stenographer and shorthand reporter for over twenty-five years; that for the past five years he has been connected with the United States Attorney's Office, at Chicago, Illinois, as Clerk to the United States Attorney and Assistant United States Attorney; that on Friday morning, November 1, 1918, he was present in the United States District Court, presided over by the Hon. Judge K. M. Landis, for the purpose of taking shorthand notes of the evidence, statements and proceedings in the case of the United States *vs.* August Weissensel, D. C. No. 6390, that this case was called by the Clerk of the Court, for disposition on verdict, that he took such shorthand notes, which said shorthand notes are a true and correct report of statements then and there made and of proceedings that then and there took place, and that the attached seven typewritten sheets contain a true and correct transcript of said shorthand notes.

And further affiant sayeth not.

HUGH P. LUTZ.

Subscribed and sworn to before me this 16th day of November, A. D. 1918.

WILLIAM A. SMALL,
Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA

For the Northern District of Illinois
Eastern Division.

United States of America }
 vs. } D. C. No. 6390.
August Weissensel }

Before the Hon. Judge K. M. Landis, Friday, November 1, 1918.

Motion for new trial and in arrest of judgment heard and overruled, and exception. Sentenced to 10 years in the United States Penitentiary at Leavenworth, Kansas, and committed.

The Clerk: 6390. United States *vs.* August Weissensel, for disposition on verdict.

Mr. Johnson: Motion for new trial in that case. At the time the verdict was entered, I talked to the defendant, and he told me at the time, the court advised him,—asked whether or not he wanted counsel; he thought he had to pay for it, therefore, he said that he did not make any request, and was surprised—

The Court: Were you here when I first brought up the subject? He did not tell you the truth,—that is just in line with everything that has been told to you by this defendant. I ordered you into the case—

Mr. Johnson: I never had an opportunity to talk to the defendant,—I simply want to complete my obligation to the court. I feel that there was some matter that came in before the jury, that was irrelevant and prejudicial to the defendant.

The Court: What was it?

Mr. Johnson: Afterwards brought out by the questions of counsel. Mr. Borrelli, after I had asked him question whether he had been arrested, Mr. Borrelli said; you were arrested for wife beating and for drunkenness, and not supporting your wife—

The Court: You asked the man if he had ever been arrested before.

Mr. Johnson: Here is a man sixty some odd years of age, head of a family of six children, living with

his family at the time, and he had never been convicted of crime.

The Court: You didn't ask him if he had ever been convicted of any crime.

Mr. Johnson: I asked him if he had ever been arrested,—it turned out afterwards he had been convicted and sent to the House of Correction. He tells me for refusing to give her any money. That happened over a year ago. He was arrested and sent down two or three years ago. He gave the jury a very bad impression.

The Court: I haven't the slightest doubt about it. You said: were you ever arrested?

Mr. Johnson: I know I did.

The question: Now, was the question of your adversary on cross-examination improper?

Mr. Johnson: He said: you were sent down there for wife beating, weren't you? His answer was, No, and then he told why.

The Court: Just for holding her supplies away from her. That had nothing to do with this.

Mr. Johnson: One of the jurymen called my attention to it, after the case had been disposed of. I know he was very instrumental in it, and I went into it, and furthermore counsel put his own son on the stand to testify, and he didn't ask him question, did your father ever argue anything against the United States, he asked him the question; isn't it a fact that your father always took the side of Germany against the United States, calling for a conclusion.

The Court: I sat here when this thing happened, and that did not happen. Did a juror tell you that?

Mr. Johnson: Not as to that, he did as to the other matters.

The Court: Well, if a member of that jury told you that the jury would have acquitted this man, if it had not been for its coming out that this man had ill treated his wife, why that juror must have been cracked in his head. Now, I doubt whether any juror expressed even an individual juror's opinion, if he used any words to that effect.

Mr. Johnson: Furthermore, Polish witnesses that took the stand, their motive was very apparent.

The Court: The jury saw whatever the motive was. They had the motive. They were trying to enlist soldiers to go over there to fight these people,

—not strange that the Polish should do that in 1918, and this man comes in there and proceeds to shoot off his mouth,—naturally they didn't like it. The strange thing about it to me is, that he went out of the barber shop on his feet instead of on his head, and had the witness been able to carry out what they intended to do, but the man was in the barber chair and these people were taking turn and they were saying something against the Kaiser and the German people, and he took protest because it was against the German people. If they have said anything worse against him that I have said, I would like to know what it is.

Mr. Johnson: I am simply pointing out it was—

The Court: A man in this country now, in 1918, that has such a judicial mind that he can express affection for this thing called the Kaiser, and his darling people, he is a little bit too judicial minded for his safety in this country.

Mr. Johnson: He did not—

The Court: This man did not? He fought his own son, in his own household, month after month, when he had another son in the United States Army.

Mr. Johnson: Yes, and he advised him—

The Court: Have you anything to say in support of your motion for a new trial?

Mr. Johnson: No.

The Court: Overruled, motion in arrest for the same reason and any other reason appearing on the record, overruled and exception. Anything further? Have you anything to say Weissensel before this case is disposed of?

(A) This talk in the barber shop was more heated against the German people than anything else, I believe, and God in heaven made the angels first, and—

The Court: God did what?

(A) Made the angels first before they made Adam and Eve; they are doing things against each other, one nation against each other, and one nation against each other, what should not be, and innocent man for just talking a few words.

The Court: God has been charged with a heap of things in the last few years—

(A) I believe in God in this thing, I had no bad mind, I had nothing against the United States, I

always was a good citizen, I took my papers out in time, 1894.

The Court: What do you mean by being a good citizen?

(A) Always did my duty.

The Court: Do you call it being a good citizen when your country is at war, to stand up and advocate the cause of the country with which your country is at war, in the presence of your own son, do you call that being a good citizen? Do you call having an argument with your own son being a good citizen?

(A) It was when reading paper,—he read one paper and I read one paper, that is all, making big thing out of a little thing.

The Court: You were spending all the energy you had to spend against the fellows from your neighborhood that were over there fighting for you. That is what you were doing.

(A) I was glad to see him in the uniform. I says, go ahead and obey your officer, and be good, do what your mother told you when you was young, what you learned from Sisters and Priest, and never disobey your officer and I will be proud of you. I bid him good-by at Union Station when I saw regiment, he belonged to the 7th Regiment since when he was 18 years old. Now he is 27, and I would like to see him back again.

The Court: I haven't the slightest doubt you would like to see him back,—I can understand that.

(A) And I have another two sons, they be private now too, they over 18 and the other is near 20.

The Court: The case of this man is a case charging violation of the Espionage Act. The charges in the indictment, which is in three counts, are that at various times and places the defendant used this language during this last summer, in the city of Chicago: You will see what Germany will do to the United States; they have got the money; they have got the men. On another occasion: Stop that talk, because I am a German; the Kaiser will soon be in New York and you will see what he will do to the United States. And on another occasion: The Germans will go right through the United States, in which connection the charge is that this defendant used other language to illustrate how the Germans

will go through, he used a well known simile a part of which simile has to do with the celebrated tin horn,—how Germany would go through the United States.

(A) I did not say that.

The Court: I say, you deny it.

(A) Your honor, I never said that.

Mr. Johnson: The man testified that he had not seen the defendant for two weeks, that he had worked with him continuously for two weeks, that during all that time they talked together, and he never heard the defendant say a thing about the war, that he was discharged, and the fact that he was discharged—

The Court: All of this is small stuff compared to the admitted stuff that finally came out on rebuttal,—that in his own home he was preaching this stuff, day after day, to his own son, with another son in the army. This is petty compared with what came out from that witness. I do not have any grave doubt that being matter of—in trial of the case to bring it out; that would have been proper on the main case on the proposition as going to the question of intent. Now this is the kind of thing that has been going on here for months. This man is the type of man that has been more efficient, to use the term that his native countrymen love,—efficient in his operations, than any other class of offenders we have got. It is just this type of man that has branded almost the whole German-American population. One German-American like this fellow, going about talking this stuff, does more damage to his people, and by his people I mean, born in Germany and after they come here, than thousands of these people can overcome by being good and loyal citizens over here. That is his real offense,—it is a case of a man who came here 40 years ago and more probably kicked out of Germany, or crawled out, or dodged—

(A) I—

The Court: Did you want to serve in the army over there? Well, ducked out.

(A) I left the old country, I have my papers, all passes—

The Court: Now this type of man came here, then the time came when this fight came on. This fellow

wouldn't even stay there and go through with the army, he didn't love it enough to do that, but he had such an affection for it that he ducked away and got across the sea to this country solely to miss that thing,—that was the depth of his affection at a time when affection for that thing over there meant something, he came over here, lived here all these years, then the time came when that thing was fighting for its life, and when we were fighting for our lives, and the only expression that this man had in his heart respecting that controversy was of affection for that thing back there. I say he is an ideal illustration of the occasional American of German birth whose conduct has done so much to damn the whole ten million in America. Now I am telling him and you too when I say that; he had a son in the army, a volunteer in the army for the United States; he had another son in his own home coming of age to be a volunteer, and under those conditions this man, day after day, and day after day, went to the mat with that boy, advocating the cause of Germany to that boy.

The Court: Give me the statute: Good citizen,—he would have been a better citizen if he had been burglarious all the forty years in America, if he had stood up now, because I know personally of some burglars, I have a personal knowledge of a safe-blower, a man I have known for 9 years personally. He is a good soldier, he has done fine. In time of peace he was that kind of a man. I know that man. He is a friend of mine. As between that safeblower by profession, now a soldier in France, and a man like this man who never blew a safe or picked a pocket, but who at this time has done what this man has done, I vote for the safeblower. He is the better citizen of the two. So far as his argument about the newspapers is concerned, it shows a heart reeking with disloyalty. He takes issue with certain statements made in the newspapers. Under this espionage act,—what is the age of this man?

(A) 53, 21st of June.

On account of that son that is in the army, I am going to give him a credit of 50%,—that son is in the army, that he did not support; that son is in the army, to whose burden this Father added consciously and deliberately, in consideration of that son, this

will be half of what it would be if it were not for that son in the army. 10 years at Leavenworth. Exception to the judgment prayed, allowed 60 days for bill of exceptions.

The Court: Call your next."

No further proceedings appear of record respecting said affidavit of prejudice.

Thereupon the said cause proceeded to trial before said Judge Landis. The jury found plaintiffs in error guilty, and they were each sentenced by said Judge Landis to twenty years imprisonment.

QUESTIONS SUBMITTED BY THE COURT OF APPEALS.

1. Is the aforesaid affidavit of prejudice sufficient to invoke the operation of the Act which provides for the filing of affidavit of prejudice of a judge?

2. Did said Judge Landis have the lawful right to pass upon the sufficiency of the said affidavit of his prejudice, or upon any question arising out of the filing of said affidavit?

3. Upon the filing of the said affidavit of prejudice of said Judge Landis, did the said Judge Landis have lawful right and power to preside as judge on the trial of plaintiffs in error upon said indictment?

FRANCIS E. BAKER,
SAMUEL ALSCHULER,
GEORGE T. PAGE,

*Judges United States Circuit Court
of Appeals, Seventh Circuit.*

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from one to sixteen, inclusive, contain a true copy of the questions certified to the Supreme Court of United States pursuant to an order of this Court entered on June 24, 1920, in the case of Victor L. Berger, Adolph Germer, William F. Kruse, Irwin St. John and Louis Engdahl vs. United States of America No. 2710, October Term, 1919, as the same

remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 24th day of June, A. D. 1920.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

POINTS AND AUTHORITIES.

I.

"Statutes in regard to changes of venue are ordinarily construed liberally."

40 Cyc. 117.

"Procedures relating to change of the place of trial should be liberally construed and a substantial compliance with its terms is sufficient."

Buck v. City of Eureka, 97 Cal. 135.

II.

As a rule statutes conferring a right to a change of venue or removal should be construed liberally and if possible, so as not to defeat the right.

16 C. J. 203.

Gardner v. State, 24 Ore. 261.

State v. Sasse, 72 Wis. (3-5, 6).

Fajardo v. N., 23 Porto Rico (71).

III.

All of the defendants joined in the application and this conforms to the narrow requirement of statutes and authorities which hold that all co-plaintiffs and co-defendants must join in the application or petition.

Henry v. Speer, 201 Fed. (869) (C. C. A. 5th C. I. R.)

40 Cyc. 146 which cites as authority *Knickerbacher Insurance Co. v. Tolman*, 180 Ill. 106.

Griffin v. Leslie, 20 Md. 15.

Dowling v. Allen, 88 Mo. 393.

IV.

The trial judge "is relieved from the delicate and trying duty of deciding upon the question of his own qualification."

Henry v. Speer, 201 Fed. (869) (C. C. A. 5th C. I. R.)

40 Cyc. 146, *Knickerbacher Insurance Co. v. Tolman*, 180 Ill. 106.

Griffin v. Leslie, 20 Md. 15.

Dowling v. Allen, 88 Mo. 393.

ARGUMENT.

The motion for a change of venue was presented in this cause in conformity with Sec. 20 and 21 of Chapter One, entitled "The Judiciary," Fed. Statutes Ann., Vol. I, Supplement 1912; Barnes Fed. Code, 781, 782. Latter Section reads as follows:

"Whenever a party to any action or proceeding civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a *personal bias or prejudice* either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit of action."

The petition for a change of venue or renewal was filed on the 8th day of November, 1918 (P. R. p. 114), in which it was averred by the petitioners, jointly and severally, that the cause in which they were defendants, that is, Victor L. Berger, Adolph Germer, J. Louis Engdahl, Irwin St. John Tucker and William F. Kruse, and which

was pending before his Honor, Judge Kenesaw Mountain Landis, judge of the United States District Court, was presided over by Judge Evan Evans, a judge of the United States Circuit Court, before whom a demurrer in the above entitled cause was heard and argued and before whom a plea of former acquittal was filed by the defendant Adolph Germer. Said Judge Evan Evans on October 26, 1918, overruled the demurrer to the indictment and sustained a demurrer filed by the government to the plea of a former acquittal interposed by Adolph Germer; that the defendants presumed said trial would be presided over by said judge who heard the motions on the demurrer and the plea of former acquittal, and they were "informed within the last week that this cause was on the calendar of and would be heard by Judge Kenesaw Mountain Landis." The petition, was dated November 8, 1918, and filed on the said date, recited that the petitioners, jointly and severally, "believe that his Honor, Judge Kenesaw Mountain Landis, has a *personal bias and prejudice* against certain of the defendants, to-wit: Victor L. Berger, William F. Kruse and Adolph Germer, defendants in this cause impleaded with J. Louis Engdahl and Irwin St. John Tucker in this case, all of whom join in the petition. That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rebbach, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And referring to a Germer who was charged with stating that Germany had

money and plenty of men and wait and see what she is going to do to the United States, Judge Landis said in substance:

"One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in the country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by *pacifists* in this country who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from German to get away from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all of the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safe-blower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safe-blower."

The defendants all joined the application for change of venue, and it was sworn to by them severally and jointly. A certificate was attached to this on the 8th day of November, 1918, by Seymour Stedman, attorney for the defendants, certifying that he prepared the petition for change of venue, the application, etc., and that it was made in good faith.

In support of the petition, we respectfully call the court's attention to the case of Henry V. Speer, 201 Fed. p. 869 (C. C. A. 5th Cir.), in which on page 871 the court says:

"Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature; that is, it is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist. In affording this relief the Congress has expressed itself plainly and perspicuously. It is not difficult to arrive at its true intent and meaning. We hold the provisions of section 21 to be available, even though the cause of action in which they are invoked arose and was commenced before the time the Judicial Code became effective.

In the enactment of section 21 the plain purpose of the Congress was to afford a method of relief through which a party to a suit may avoid trial before a judge having a *personal* bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent. The statute qualifies the words bias and prejudice by the single word 'personal.'

Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has *no other or further duty to perform* than that prescribed in section 20 of the Judicial Code. He is *relieved from the delicate and trying duty* of deciding upon the question of his own disqualification."

The attorney for the government offered a transcript of evidence, which the court permitted to be filed, stating the controversy between the court, the lawyer and the defendant in the case of *United States v. Aug. Weissencel* (P. R. p. 122), which, although interesting, can have no bearing upon the issue raised by the motion and affidavit for a change of venue, for the reason, as stated in the case of *United States v. Speer, supra*, the judge is relieved

from the duty of determining the fact as to whether he has a personal bias or prejudice or a bias against "the defendants" or whether there exists a "prejudice" of said Judge Landis against said Berger, Germer, Kruse, etc. (P. R. p. 117.)

In the case of *Jones v. Chicago & Northwestern R. R. Co.*, 36 Iowa, p. 68, the court held that "an application for a change of venue cannot be met by counter affidavits," and in support of this see the case of *Smith v. Amies, Trustee*, 30 Ind. App. Ct. Rep., p. 530.

The Federal Statute makes a change of venue mandatory and the author says (40 Cyc. 163):

"where the granting of the change of venue is mandatory upon the filing of an application or affidavit in proper form, the adverse party has no right to file counter affidavits."

The Federal Statute provides specifically the method to be pursued to obtain removal from a judge who is deemed disqualified by reason of a personal bias and the language of the Act is "Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists." From this it is clearly apparent that the gist of the application is the belief of the applicants that the judge has a personal bias against the moving party. Obviously it would be impossible to state as a fact what is in the mind of the presiding judge.

The same Act further provides for a statement of facts upon which this belief is based and an affidavit stating facts upon information and belief is no less a statement of facts because they are so stated to be upon information and belief. To require the applicant to know of his own knowledge the facts upon which the petition is based would nullify the purpose and object of this Act.

The suggestion that the charge of perjury would not lie against persons making a statement upon information

and belief is erroneous for the reason that if a sworn statement upon information and belief is false and known to be such, it would subject the affiant to prosecution and conviction. There is no provision in the Act permitting the statement of facts by persons who are *not* parties to the suit. The application of the moving parties must contain the essential elements upon which to predicate the right for a change of venue or renewal. Therefore, it was evidently within the contemplation of Congress and within the meaning of the Act that the privilege should be afforded the litigants where there was a well-founded belief that the presiding judge had a personal bias and the allegation of facts required was evidently for the purpose of showing the good faith and honesty of the parties making the application.

The prejudice and bias of a judge against a class of persons includes a bias and prejudice against each member of the class. If a judge had a bias and prejudice against the Irish, this would include a prejudice and bias against any single Irishman who might come before him for trial and we need not recall the historic evidence of this fact based on racial and religious hatreds and antipathies.

Respectfully submitted,

SEYMOUR STEDMAN,

Attorney for Plaintiffs in Error.

